United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7441

United States Court of Appeals

For the Second Circuit

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff-Appellee,

against

S.S. IRISH SPRUCE, HER ENGINES, TACKLE, ETC.,

and against

IRISH SHIPPING LTD.
Defendants-Appellants.

In the Matter of the
Complaint of
IRISH SHIPPING LTD., Plaintiff-Appellant, as owner of the S.S. "IRISH SPRUCE",
For exoneration from or limitation of liability.

COMPANIA PERUANA DE VAPORES, S.A.,
Claimant-Appellant;

AMERICAN SMELTING AND REFINING COMPANY,
Claimant-Appellee.

BRIEF OF APPELLANT IRISH SHIPPING LTD.

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United States Court of Appeals

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American Smelting and Refining Company,

Plaintiff-Appellee,

against

S.S. Irish Spruce, Her Engines, Tackle, Etc.,

and against

Irish Shipping Ltd.

Defendants-Appellants.

In the Matter of the

Complaint of

Irish Shipping Ltd., Plaintiff-Appellant, as owner of the

S.S. "Irish Spruce",

For exoneration from or limitation of liability.

Compania Peruana de Vapores, S.A.,

Claimant-Appellant;

American Smelting and Refining Company,

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BRIEF OF APPELLANT IRISH SHIPPING LTD.

Statement of the Issues Presented for Review

Having approved the conclusion of a Special Master, to whom the District Court had referred the case "to hear and report", that the "immediate", "proximate" cause

of a stranding and consequent cargo loss was navigational error, for which a carrier is entitled to exoneration under § 4(2)(a) of the Carriage of Goods by Sea Act (COGSA),[1] and the burden of proving that unseaworthiness was a cause having thus rested with the cargo interests under the rule of *The Maru*,[2] did the District Court err:

1. In approving the Special Master's clearly erroneous conclusion that the carriers had failed to exercise due diligence to make the vessel seaworthy, in that they had not more promptly forwarded to the vessel a very recently published edition of a list of radio signals, although the list on board contained perfectly correct and ample information concerning a certain aero radiobeacon the Special Master believed the navigators should have used in an effort to avoid the stranding;

2. In eventually approving (after initially withholding approval) the Special Master's clearly erroneous conclusion that the absence of the recently published edition of the list of radio signals was a contributing cause of the stranding, in the face of uncontradicted evidence that the navigators did not consult the list that *was* on board, as they had no intention of using the vessel's radio direction finder (RDF) at the material times;[3]

3. In receiving in evidence, over timely objection, the depositions of navigators of other vessels that had made voyages remote in time from the casualty voyage, purporting to establish the advantages of using a certain aero radiobeacon, despite the failure of the cargo interests to

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[1] 46 U.S. Code § 1304(2)(a).

[2] Director General of India Supply Mission v. S.S. Maru, 459 F.2d 1370 (2d Cir. 1972), *cert. denied* 409 U.S. 1115 (1973).

[3] Italics throughout this Brief have been supplied, except where otherwise indicated.

show that the conditions prevailing on those voyages were in any way similar to those prevailing on the casualty voyage;

4. In failing to disapprove the Report and Supplemental Report on the ground that the Special Master had held the carriers to a higher "counsel of perfection" than the law requires because the vessel carried British (Decca Navigator) rather than American (Loran) position finding equipment, the Special Master having based his preference for Loran on expertise (asserted for the first time in his Report) said to have been acquired during Coast Guard experience which included two Loran station commands—an experience never disclosed until the hearing was well underway;

5. In failing to disapprove the Report and Supplemental Report on the further ground that the Special Master had held the carriers to a higher "counsel of perfection" than the law requires because the vessel carried British, rather than American charts and nautical publications.

Statement of the Case

Following the stranding of the Irish flag S.S. IRISH SPRUCE on January 27, 1972, on Quita Sueño Bank in the Caribbean Sea, some 120 miles off the Nicaraguan coast, Appellee Cargo Interests ("Cargo") commenced an action against her Owners, Irish Shipping Ltd., and her Time Charterers, Compania Peruana de Vapores, in the United States District Court for the Southern District of New York, for loss of cargo resulting from the stranding. Owners thereafter filed a complaint for exoneration from, or limitation of, any liability arising out of the stranding, and the first action was thereupon stayed. Cargo filed a claim for $2,200,000 in the limitation proceeding.

The original action and the limitation proceeding were subsequently consolidated for trial on the sole issue of liability.

In January, 1974, following extensive discovery proceedings and trial preparation, counsel were advised by the Clerk of the Honorable Marvin E. Frankel, D.J., to whom the case had been assigned, that the Court was requesting the parties' consent to a reference of the case to a United States Magistrate as special master to "hear and report". The Clerk was asked whether, in making the request, the Court was aware of the substantial amounts involved. He replied in the affirmative, and the parties thereafter consented. Accordingly, an order was entered on January 28, 1974, referring the case to Magistrate Gerard L. Goettel as Special Master. (Docket Entries, viii a, xiv a[4]).

A three day hearing was held in April, 1974, and on October 15, 1974 the Special Master issued his Report, holding both Owners and Charterers liable to Cargo and holding Charterers entitled to indemnity from Owners in respect of their liability. (975a). The Report took the form of an opinion, rather than proposed findings and conclusions keyed to the extensive testimony and numerous exhibits received in evidence.

Fully agreeing with Owners' contention that the proximate cause of the stranding was navigational error, the Report further found that a contributing cause was a failure to exercise due diligence in supplying the vessel with a very recently published edition of the British Admiralty List of Radio Signals, although the new edition contained no information relating to the aero radiobeacon

[4] References are to pages of the Joint Appendix, except where otherwise indicated.

in question contrary to that included in the 1969 edition which *was* on board.

Cargo moved for confirmation of the Report, while Owners and Charterers filed objections thereto. On March 4, 1975 the District Court issued its Memorandum Decision (1017a), approving the Special Master's conclusion of "unseaworthiness" but withholding approval of his ruling on the issue of causation, stating:

> From the court's study of the record, the evidence appears to refute rather than support the finding that Second Officer Healy would have consulted the [recently published] list. And if that is so, the record may not support the finding that any responsible officer at any material time would have done so. (1021a).
>
> • • •
>
> Granting the importance of the impressions of conscientiousness drawn by the Magistrate from observing Second Officer Healy, the quoted testimony would appear to cut considerable, very possibly crucial, ground from under the finding that the radio list would have been used. (1022a).

Having found itself "driven to withhold approval" of the Report on the "significant finding" of causation, the District Court remanded the case to the Special Master, who issued a Supplemental Report dated May 8, 1975, adhering to the conclusion of causation reached in his original Report. (1024a). Despite the reservations expressed in its Memorandum Decision of March 4, 1974, the District Court approved the Supplemental Report in a Supplemental Memorandum dated June 16, 1975. (1036a).[5]

This appeal followed.

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[5] The decisions below have not yet been reported.

Statement of Facts

1. The Vessel and Her Equipment

The IRISH SPRUCE was a dry cargo vessel of 7,875 gross tons, built in England in 1957 and classed "100A-1" with Lloyd's Register of Shipping. (2a). She was equipped with an unusual number of sophisticated electronic and other navigational devices for a vessel of her size and age, including gyro compass, radar, "automatic pilot", course recorder, radio direction finder (RDF), fathometer (depth sounder) and "Decca Navigator" (a British type electronic position finding device). British Admiralty "Notices to Mariners" and new editions of other Admiralty nautical publications were regularly forwarded to the vessel by Owners' Head Office in Dublin as required by the vessel's officers, and the Master was authorized to purchase such other publications as he considered necessary, at any port of call. (136a-137a).

2. The Vessel's List of Radio Signals

As the Magistrate found the IRISH SPRUCE materially "unseaworthy" only in respect of the Admiralty List of Radio Signals on board, the facts relating to that publication are of the greatest significance on this appeal and will therefore be outlined in some detail.

The Court will presumably take judicial notice of the fact that while many governments issue charts and other nautical publications pertaining to their local waters, the only two comprehensive worldwide compilations of nautical information are those published by the British Admiralty and those published by the U.S. National Oceanic and Atmospheric Administration. Virtually all seagoing vessels, regardless of flag, are equipped with one or the other. The IRISH SPRUCE was equipped with British Admiralty

charts and other nautical publications. Among these was the 1969 edition of the "Admiralty List of Radio Signals" in two volumes. Volume I contained particulars of coast radio stations, medical advice by radio, and other matters in no way pertinent to the issues. Volume II, with which we are here concerned, contained information relating to marine radiobeacons and also aero radiobeacons, intended primarily for aircraft but sometimes used by vessels. (Exh. 10, 795a)

Volume II of the 1969 edition on board included a diagramatical "Index to Radiobeacon Diagrams", in the form of a miniature chart of the world, subdivided into some 17 areas, each of which bore the number of one of 17 small area charts, printed in the same volume, immediately following the diagramatical "Index", which a navigator would consult if he wished to learn what radiobeacons there were in the area in which his vessel was steaming. The charts were also referred to in the Table of Contents at page 5. (798a) Thus, if a navigator of a vessel in the Caribbean wanted to ascertain what radiobeacons, if any, were in the general vicinity of his vessel, he would see from a glance that the Caribbean was included in area chart 5494. (Exh. 10, p. 5, 798a, Exh. 10a). He could then turn to that chart, where he would find the location and name of each marine radiobeacon plainly shown in red, and the location and name of each aero radiobeacon plainly shown in blue (Exh. 10a). Alongside the name of each marine radiobeacon he would find its station number, identification signal (call sign), frequency, and group sequence number. Alongside the name of each aero radiobeacon he would find its call sign and frequency. A copy of chart 5494 (Exh. 10a), in the same size and colors in which the original in the back of the 1969 edition of the List of Radio Signals was printed, is reproduced herein

for ready reference. As will be seen, the San Andres Aero Radiobeacon plainly appears in blue in the lower central portion of this chart, between 12° and 13° North Latitude and 81° and 82° West Longtitude, together with the Radiobeacon's call sign (SPP) and its frequency (387). The navigator would thus have, at a glance, all of the information he could possibly need if he wanted to try to obtain a signal from the San Andres Radiobeacon and thereby ascertain its approximate bearing (direction) from his vessel—(1) its location, (2) its call sign, and (3) its frequency. It is undisputed that this information was entirely correct, not only when the 1969 edition was published, but at all times up to and including the time of the stranding of the IRISH SPRUCE.

The British Admiralty "Notice to Mariners" for November 6, 1971, issued while the IRISH SPRUCE was operating far from her home port of Dublin, announced publication of a new edition of the Admiralty's List of Radio Signals (791a-792a, 913a). The arrangement of this edition differed in some respects from that of the earlier one. Like the earlier edition, the new one was in two volumes, but whereas in the earlier edition the diagramatical "Index to Radiobeacon Diagrams" and the area charts appeared in the back of Volume II, in the later edition the "Index to Radiobeacon Diagrams [charts]" and the area charts following it were contained in a folder labeled "Radiobeacon Diagrams 1971 (to accompany Admiralty List of Radio Signals Volume 2)." (Exh. E, 939a).

But the principal difference between the two editions was that whereas in the earlier one, the call sign and frequency of each radiobeacon appeared alongside its name on the area chart showing its location, in the newer edition only the name and location of a radiobeacon could be learned from the chart. Upon finding, from the pertinent

Separate copies of this diagram are obtainable from Chart Agents.

CENTRAL AMERICA AND THE WEST INDIES

RADIOBEACONS

Marine Radiobeacon with Station Number, Identification Signal, Frequency and Group Sequence Number.

No signals transmitted during clear weather.

Aero Radiobeacon with Identification Signal and Frequency.

NOTE.—Radiobeacons of very low power in inner waters and certain Aero Radiobeacons are omitted.

See Diagram No. 5495

Weeksville(EKV)254

245(NKT)Cherry Pt.

216(CLB)Carolina Beach

269(MTL)Conway

329(CH) Charleston

Glynco(NEA)275

Jacksonville(JAX)344

Destin(DES)201

391(BIX)Keesler

Pensacola(PNS)326

Sanford(NRJ)408

Melbourne(MLB)257

209(XVN)Venice

341(FMY)Fort Myers

Treasure Cay(ZTC)233

Grand Bahama(GBN)326

Palm Beach(PB)356

260(MTH)Marathon

Eleuthera(RSD)302

Nassau(ZQA)251

Key West(EYW)332

San Salvador(SSJ)281

348(UHA) Habana

Giron(UGN)230

Cienfuegos(UCF)212

395(SAJ)San Julian

296(UBO)Bayamo

382(UPA)Pta Alegre

Quince y Medio(USR) 315

Great Inagua(ZIN)376

Grand Turk(GT)232

South Caicos(CM)260

Camaguey(CMM)370

Holguin(CMG)278

Tuxpan(TUX)262·5

Mérida(MID)280

Cozumel(CZM)201

Nautla(NAU)392

Campeche(CPE)227

Carmen(CME)289

344(ZIY)Grand Cayman

339(CMH)Santiago

323(NBW)Guantánamo Bay

Montego Bay (6YM) 248

Ramey(RMY)347

St.Croix(STX)224

St. Maarten(PJM)308

Antigua(ZDX)369

300(MTT)Minatitlán

262·5(CTM)Chetumal

392(ZDZ)Belize

Swan I.(SWA)407

360(6YK)Kingston

270(HHP) Port au Prince

400(HIV)Punta Caucedo

Acapulco(ACA)292

Ixtepec(IZT)365

300(FXG) Guadeloupe

Martinique (FXF)314

385(BA)Puerto Barrios

La Ceiba(LCE)227

Nacunta(NA)355

318(TAP) Tapachula

Iztapa(IZP)400

Puerto Cabezas(PZA)1,662

St. Lucia(SLU)415

San Salvador(YSX)215

San Andres (SPP) 387

403(SV)St. Vincent

345(8PY)Barbados

290(YNP)Managua

Grenada(ZGT)362

Aruba(PJH)328

Curaçao(PJG)343

Bonaire(PJB)321

385(LSP)Las Piedras

295(RHC)Riochacha

Maiquetia(MIQ)292

Porlamar(PMV)206

Tobago(TAB)323

Port of Spain(POS)392

Barranquilla(BAQ)353

Cartegena (CTG)255

2848 Tierre Bomba (CG)280

Maturin(MUN)230

336(BLA)Barcelona

Amacuro

Cristóbal(FTD)326

260(TIKT)Los Horcones

380(TIKY) Puerto Limon

Howard(BHO)282

Isla Taboga(TBG) 311

234(TUR)Turbo

350(TA)David

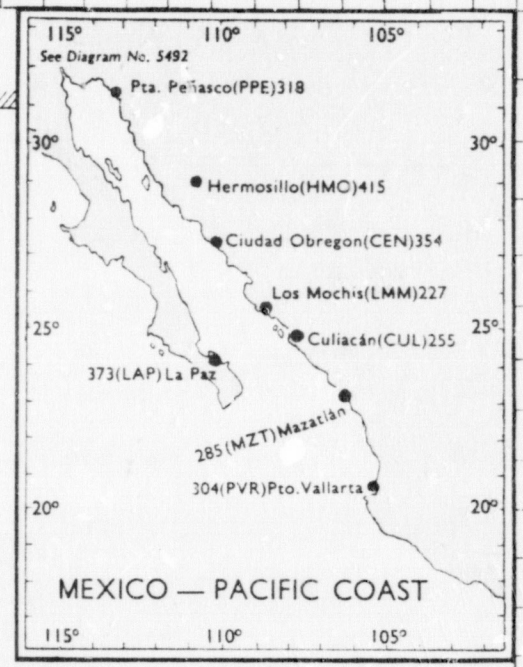
See Diagram No. 5493

NOTE

Radiobeacons in the United States are normally arranged in groups of up to 6 beacons. The duration of the complete group transmission is 6 min. Each beacon normally transmits once in each cycle.

EXAMPLE: Freq.:294 kc/s. Identification Signal: E, transmitted in the 3rd minute of each 6 min. period of transmission (i.e. commencing at H+02).

See inset



Longitude 80° West from Greenwich

London — Published at the Admiralty, 1st January, 1962, under the Superintendence of Rear-Admiral E. G. Irving, O.B.E., Hydrographer.

New Editions 15th August, 1969

area chart in the newer edition, that there was an aero radiobeacon in the area, a navigator wishing to try to make use of it would be required to turn to Volume 2 in order to ascertain its call sign and frequency. (Exh. E). There he might also find, in addition to the information contained in the earlier edition, the wattage (power) of the aero radiobeacon, and the hours during which it was supposedly in operation and whether it was, like most aero radiobeacons, in continuous operation, or whether it operated only during certain hours.

Thus, in the more recent edition, a navigator noting from the area chart of the Caribbean in the folder accompanying Volume 2 that there was an aero radiobeacon on San Andres Island, would, if he wanted to try to make use of it, have to turn to Volume 2 itself, from which (with some difficulty, as will be explained in Point I) he might have been able to obtain the same information as he could have obtained from the area chart itself in Volume II of the earlier edition, *i.e.*, the radiobeacon's call sign (SPP) and its frequency (387); he might also be able to find (with difficulty) in the later edition the notation "1.0 kW cont." *i.e.*, that the radiobeacon's power was one kilowatt, and that it was supposed to operate continuously.

The "Notice to Mariners" announcing publication of the new edition was forwarded to the IRISH SPRUCE at San Francisco promptly after its receipt by Owners' office in Dublin. (140a-141a). Second Officer Healy sent a requisition for the new edition (as well as for various charts and other nautical publications) to Owners' office in Dublin, which then directed their agents to mail the requisitioned materials (including the new edition of the List of Radio Signals) to the IRISH SPRUCE at New Orleans, where they arrived January 23, 1972, and would have been delivered to the vessel on her arrival at that port, had it not been for the stranding on January 27th. (Exh. P, 966a, 141a-142a).

3. The Vessel's Officers

Captain Kerr was Master of the IRISH SPRUCE from July 7, 1971 until her loss. (455a). Since 1945 he had held a British Master's license, which fully complied with Irish Government requirements. (455a). Each of the deck officers held a *higher* license than his position required; Chief Officer Kelly had received a British Master's license in 1964 (511a), Second Officer Healy had held an Irish Chief Officer's license since July 1970 (29a, 525a), and Third Officer O'Connor had obtained his Irish Second Officer's license in June 1970. (553a).

4. The Voyage on which the Vessel Stranded

At the material times the IRISH SPRUCE was operating under a New York Produce Exchange form time charter providing for worldwide trading, as ordered by Charterers. (Exh. 42). In January 1972, pursuant to Charterers' instructions, she loaded cargo at ports on the West Coast of South America for carriage to New Orleans and other United States Gulf ports, under bills of lading issued by Charterers and signed by the Master. (2a).

With this cargo on board, the vessel transited the Panama Canal on January 25, 1972. (3a). Her projected course to New Orleans was then northerly toward the Yucatan Pass, passing between Roncador Bank and Serrana Bank to the East, and San Andres Island, Providence Island and Quita Sueño Bank to the West. (3a). Quita Sueño Bank lies about 120 miles off the East Coast of Nicaragua, an area where "hazards to navigation are poorly marked and inadequately service". (Report, 977a). Early in the morning of January 26th, shortly after leaving the Canal, rough seas and heavy swells forced a change of course more to the Eastward than had been projected, (36a) and as the weather eased after noon other minor

changes were made to regain the base course. (38a). Partly cloudy skies and rain made it impossible to obtain reliable star sights and reliance was therefore placed on "dead reckoning" and "sun line" positions. (109a). Third Officer O'Connor took sun sights at about 0930 or 1000 hours, moved up the morning "position line" until noon, and then took noon sun sights. The noon position thus ascertained was checked by Second Officer Healy, who considered it correct. (39a, 532a-533a, 554a). At about 1900 hours Chief Officer Kelly, who stood the 1600 to 2000 watch, attempted to obtain a position by star sights, but was prevented from doing so when the horizon became obscured by rain. (108a-109a).

The intention of the IRISH SPRUCE's navigators was to alter course to the Northwestward, from 330° to 323°, upon sighting the light on Roncador Bank. Although Captain Kerr and his officers had expected to see the light at about 2300 hours, they did not in fact see it, nor was any radar "echo" from the Bank obtained. (45a). The vessel was accordingly kept on a course of 330° until midnight, when the intended alteration to 323° was made. (480a). Despite the officers' inability to see the light, or to obtain a radar "echo" from Roncador Bank, full sea speed was maintained and the vessel continued to be steered by "automatic pilot". (48a-49a).

5. The Watch on which the Stranding Occurred

Second Officer Healy stood watch on the bridge, with a seaman lookout, from midnight until the stranding, and Captain Kerr was on the bridge during most of that period. (73a). The radar and the fathometer were in operation. (97a). The radio direction finder (RDF) was switched on by Mr. Healy during his watch, but he was unable to hear anything but static, and thereafter gave it no further attention. (77a, 535a).

Prior to the stranding the "echoes" of a number of rain squalls in the area appeared on the radar screen, but the sky remained fairly clear until about 0300 hours, when it clouded over.

At 0230 hours an "echo" of an object was observed on the radio screen, bearing 15½° on the vessel's starboard bow. Captain Kerr and Second Officer Healy thought that while it might be a rain squall, it was more likely another vessel, since the "echo" was a clear one. Mr. Healy continued to observe the "echo" on the radar screen, and to plot its position relative to the IRISH SPRUCE until shortly before the stranding occurred an hour later. Although it became apparent from continued plotting of the "echo" that the object was a stationary one, it did not occur to the officers that it might be a charted wreck on Quita Sueño Bank, as it proved to be.

The first indication that the IRISH SPRUCE might be nearing shoal water was a return on the fathometer (depth sounder). However, the Bank was a sharply rising one, and the return came too late to take the way off the vessel in time to avoid the stranding; full sea speed was maintained until a half minute before the IRISH SPRUCE ran hard aground on Quita Sueño Bank, at 0329 hours. (56a, 99a).

Although the navigators of the IRISH SPRUCE had failed to pick up the light on Roncador Island, and were therefore "lost", they had imprudently pressed on at full sea speed into an area of known reefs and dangers. Undoubtedly, "the immediate cause of the loss of the 'IRISH SPRUCE' was the navigational errors of her officers," as the Special Master found. (Report, 986a).

APPLICABLE STATUTES AND RULES

(SEE ADDENDUM)

Summary of Argument

I.

Owners having established, to the satisfaction of the Special Master and the District Court, that the stranding and consequent cargo loss were caused by navigational error—a cause excepted under COGSA—to be entitled to recover for the loss, Cargo was required to prove (1) unseaworthiness, and (2) a causal connection between the unseaworthiness and the loss. It utterly failed to prove either.

The only "unseaworthiness" the Special Master concluded was a material cause of the stranding lay in the fact that the List of Radio Signals on board was a 1969 edition, and that although a very recently announced 1971 edition was on order, it had not reached the IRISH SPRUCE before she stranded. But the pertinent information in the 1969 edition on board was perfectly correct and adequate, and the absence of the 1971 edition was therefore not a deficiency rendering the vessel "unseaworthy". Furthermore, Owners used "due diligence" in the steps taken to get the 1971 edition to the vessel.

II.

Even if it be assumed, *arguendo,* that having on board the 1969 edition, instead of the 1971 edition, rendered the vessel "unseaworthy", Cargo completely failed to prove any causal connection whatsoever between the alleged "unseaworthiness" and the stranding and consequent cargo loss. In order to reach his ultimate conclusion that the absence of the 1971 edition caused the stranding, the Spe-

cial Master was constrained to make the following findings, not a single one of which is supported by the evidence:

> 1. That the San Andres Aero Radiobeacon was in operation during the period on January 26/27, 1972 when the vessel was drifting off course to the westward;
>
> 2. That if the 1971 edition of the List of Radio Signals had been on board the navigators would have consulted it (although they did not consult the 1969 edition that *was* on board);
>
> 3. That if the navigators had consulted the 1971 edition they would have noted the existence of an aero radiobeacon on San Andres;
>
> 4. That if the navigators had noted the existence of the aero radiobeacon, they would have activated the radio direction finder (RDF);
>
> 5. That if they had activated the RDF it would have been possible to obtain reliable bearings;
>
> 6. That if the navigators had obtained reliable bearings they would have obtained a "running fix" and/or would have obtained a "danger bearing" when nearing the banks;
>
> 7. That if the navigators had obtained a "running fix" and/or a "danger bearing", they would have been persuaded that their dead reckoning was in error and would have taken steps to correct the vessel's course.

In reviewing this progression of speculative findings in the Special Master's Original Report, the District Court, despite its express avoidance of such speculative findings in *The Nicolaos S. Embiricos*, 1974 A.M.C. 2608, 2613

(affirmed on the opinion below), 506 F.2d 1395 (2nd Cir. 1974), accepted all of them except No. 2, as to which it withheld approval, quoting testimony indicating the navigators would *not* have examined the 1971 edition.

While none of the findings is supportable, and all should have been rejected, Owners submit that finding No. 5 is clearly erroneous, as even a novice in the use of electronic navigational aids would know. This finding was made in the face of—and indeed without mention of—the only evidence as to obtainability of radio bearings during the 15½ hours preceding the stranding, *i.e.*, that the Second Officer turned the RDF on at midnight, received only static and so gave it no further attention.

On reconsideration the Special Master, "in the context of the overall testimony", denied that he had ever made the specific finding on causation to which the District Court had taken objection. (1024a). Obviously disregarding Exhibit 10a (reprinted following p. 7 herein), the Special Master held that the navigators of the IRISH SPRUCE were completely familiar with the 1969 edition and knew that they would not find San Andres in it, a manifestly contradictory finding which should have been rejected by the District Court.

III.

The Special Master's failure to make timely disclosure of his claim of expertise on the subject of Loran, acquired as a result of his Coast Guard Loran Station commands, and his reliance thereon in drawing inferences and reaching conclusions, would require a remand of the case for a new trial by a District Judge even if the decision below were not reversible for failing to set aside, as clearly erroneous, the Special Master's findings and conclusions in

respect of "unseaworthiness" and causation. But in Owners' submission, the decision should be reversed on those issues, for the reasons set forth in Point I, which concerns the "unseaworthiness" issue, and Point II, which relates to that of causation. If the Court agrees, it need not reach Point III, which is concerned with the Special Master's erroneous reliance on his own claimed expertise in concluding that equipment of the vessel with Decca Navigator rather than Loran, and with British, rather than American nautical publications, imposed upon Owners a higher "counsel of perfection" than the law requires.

POINT I

The Special Master's Conclusion That Owners Failed To Exercise Due Diligence To Make The Irish Spruce Seaworthy Was Clearly Erroneous And The District Court Erred In Failing To Set It Aside.

The Special Master concluded that "the immediate cause of the stranding was imprudent navigation" (983a), as Owners contended from the start. The law applicable in such a case could not be more clear: navigational error having been established as the cause of the loss, the carrier is entitled to exoneration under COGSA unless the cargo interests meet the burden then imposed upon them of proving (1) that the carrying vessel was unseaworthy, and (2) that the unseaworthiness was a cause of the loss. *Director General of India Supply Mission* v. *S.S. Maru* (hereinafter *"The Maru"*), 459 F.2d 1370 (2d Cir. 1972), *cert. denied* 409 U.S. 1113 (1973).

Although Cargo's representative was given the full run of the IRISH SPRUCE following the stranding, Cargo was able to find no basis for criticizing the vessel, her navigational

equipment or her manning; it charged only that Owners and Charterers

> failed to exercise due diligence to make the vessel in all respects safe and seaworthy prior to the inception of the voyage, in that the vessel was not equipped with the necessary nautical publications for navigation in the western Caribbean Sea, and that the stranding and resulting loss, damage and expense to cargo were directly caused as a result thereof. (Pre-Trial Order, Par. 5[b], 4a).

The nautical publications on board the IRISH SPRUCE which Cargo alleged were deficient were (1) the "West Indies Pilot" (the pertinent volume of the British Admiralty "Sailing Directions"), and (2) the "Admiralty List of Radio Signals".

It is an easy matter to dispose of the alleged deficiency in respect of the "West Indies Pilot". The volume on board was originally published in 1956, but included a supplement published in 1968. A newer edition, entitled "The East Coast of Central America and West Indies Pilot", published in 1970, had not reached the vessel before the stranding, although it was on order. It included advice that "caution should be exercised when passing eastward of Quita Sueño Bank as the current here sets strongly to the westward and on the bank". While similar advice did not appear in the edition of the "West Indies Pilot" on board, it *was* contained in an article concerning strandings, including an earlier stranding on Quita Sueño Bank, on the reverse of an American pilot chart indicating the currents in the area through which the vessel was steaming. The Second Officer testified that he had read the article and was aware of the caution. Furthermore, it is obvious that there was no current setting "strongly to the westward and on

the bank" the morning of the stranding. Mr. Healy maintained a radar plot of an "echo" which turned out to be a wreck on Quita Sueño Bank for an hour before the IRISH SPRUCE took the strand. The speed of the approach to the bank as plotted is precisely the speed of the vessel. If there had been a strong onshore current the speed of the approach would of course have been greater.

Cargo made no charge of unseaworthiness because this Irish flag vessel used the British, rather than the American, compilation of nautical publications. Nevertheless, the Special Master, while conceding that the British publications "are considered, overall, among the world's best (if not *the* best[6]),'' treated the absence of "complete American nautical publications" as a "failure". (990a).

In any event, while in the Special Master's view the absence of the most recent edition of the Admiralty "Pilot", and the U.S. publications, "constituted an 'unseaworthy condition' in the legal sense", he concluded that "*this unseaworthy condition does not appear to have been a material cause of the stranding.*" (992a). It was, in fact, no cause at all.

The only charge of "unseaworthiness" made by Cargo which the Special Master found *was* a material cause related to the 1969 edition of the Admiralty List of Radio Signals on board. Quoting the Preface to Herman Wouk's *The Caine Mutiny*, the Special Master said that "Although the absence of the new light list [sic] may seem a small defect, 'the event turned on [it] . . . as the massive door of a vault turns on a small jewel bearing' ". (1003a).

It is interesting to note, however, that if a navigator had the 1971 edition available, but failed to consult the area chart for the Caribbean and instead tried to find a radio-

[6] Emphasis by the Special Master.

beacon in the area by looking in the geographical index, he would naturally turn to Nicaragua. There he would find no mention of San Andres, which the 1971 edition lists under Colombia, presumably because it is a possession of Colombia, although it is located only about 110 miles due east of the Nicaraguan coast, and about 385 miles northwest of the nearest point on the Colombian mainland. The Special Master himself conceded, in his Supplemental Report, that "the San Andres beacon is not as clearly listed in the 1971 Admiralty List of Radio Signals as it might have been. It geographically appears under Columbia [sic], although it is closer to the coast of Nicaragua * * *." (1029a).

In the original Report the absence of "1.0 kW cont." from the 1969 edition was characterized as the most important basis for the Special Master's charge that the equipment of the vessel with that edition, rather than the 1971 edition, was "a small defect". But all else aside, how could it possibly be said that evidence of the omission of that information from the 1969 edition satisfied Cargo's burden of proof under *The Maru,* when a navigator *not* using the RDF would have had no occasion to consult *any* list of radio signals, and a navigator *using* the RDF would find "San Andres", with its call sign and frequency, in the area chart in the 1969 edition, although he would possibly "have missed [it] . . . in examining the new list", as the Special Master conceded, because the beacon was "not as clearly listed in the 1971 Admiralty List of Radio Signals as it might have been"? (1029a).

In any event, to anyone who has ever operated even an ordinary home radio, the suggestion that he will be deterred from attempting to tune in a broadcast he wants to hear because he does not know the rated power of the broadcasting station or is not sure whether it operates continuously, or only during certain hours, would be pre-

posterous. It is equally preposterous to suggest that a navigator who wants to obtain a signal from an aero radiobeacon will be deterred from trying merely because he does not know its rated power, or whether it operates continuously, as most aero radiobeacons do. There is nothing particularly unique, complicated or esoteric about RDF. Its operation is based on a principle which does not differ from that of any ordinary home radio, except that with RDF it is possible to determine the direction (bearing) from which the wireless signal is emitted. As with a home radio, to receive a broadcast, it is obviously necessary that the station from which the broadcast is to be received be broadcasting. As with a home radio, the operator need know only its call sign and its frequency to identify the station properly. As with a home radio, except for stations broadcasting within a few miles of the receiver, the quality of the reception—if it is possible to receive the broadcast at all—will vary greatly with atmospheric conditions and intermediate interference.

In its Memorandum Decision of March 4, 1975 (1021a) the District Court was "driven to withhold approval" of the "finding that the crew, and quite particularly Second Officer Healy, would have consulted the up-to-date radio list and thus discovered the availability of the San Andres beacon."

Thus faced with the District Court's announced difficulty with his finding of causation, the Special Master *changed his finding.* In his Supplemental Report, he stated:

> On the night in question, Healy turned on the radio direction finder and attempted to pick up the Swan Island signal which was the nearest radio direction beacon of which he was then aware. Conse-

> quently, the conclusion to be drawn from the testimony set forth in the memorandum opinion of the Court is that it did not occur to the navigator to look in the old radio list *since he was already completely familiar with its contents. He knew he would not find San Andres in it, nor any other station within 200 miles.* (1025a).

This was a plain misstatement of the undisputed and indisputable facts. If he had looked in the 1969 List on board, Mr. Healy *would* have found the San Andres Aero Radiobeacon in the chart of the Caribbean area in the back of the book, with its call sign (SPP) and frequency (387), as well as its location, all plainly shown, as will be seen from a glance of the chart itself, or the reproduction printed herein.

Even if the finding in the original Report that the inclusion of "1.0 kW cont." in the 1971 edition, but not in the 1969 edition, made the 1969 edition a "small defect" rendering the IRISH SPRUCE "unseaworthy"—and it did not—that conclusion was abandoned in the Supplemental Report, wherein the charge of "unseaworthiness" is that *the San Andres Radiobeacon could not have been found in the 1969 edition at all*—a charge flatly contradicted by the document itself.

Information concerning the existence of an aero beacon on San Andres could be found not only in the 1969 List of Radio Signals but in at least two other nautical publications on board the IRISH SPRUCE: The Coast Pilot (785a, 788a) and the Light List (849a, 853a).[7]

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[7] In both his Original Report and his Supplemental Report the Special Master repeatedly confused the vessel's Light List with her List of Radio Signals—the list which became the crucial document in the case. See Report (1003a) (corrected at Cargo's request, 1010) and Supplemental Report (1025a, 1028a).

There is no substance to the charge that the 1969 edition contained a warning that unlisted aero beacons were not considered reliable for marine use. As the navigators of the IRISH SPRUCE made no effort to use the RDF after midnight, when Second Officer Healy turned it on but, getting nothing but static, gave it no further attention, and as no one ever looked at the List on board on the night of the stranding, what possible effect could the warning have had, even if it be assumed that "unlisted" was intended to mean "unlisted except in the area charts in the back of Volume II"? In any event, the 1971 edition contained *exactly* the same warning, in bold face type on page 13 (the first page of "Definitions and General Information"):

> Caution:
>
> It is very important to bear in mind the following facts when using Aero Radiobeacons:
>
> 1. The inclusion of an Aero Radiobeacon in this volume does NOT[8] imply that it has been found reliable for marine use.
>
> 2. It is not possible to predict the extent to which land effect may render bearings unreliable.
>
> 3. Although every effort is made to publish changes as they occur, information concerning alteration, shifting or withdrawal of Aero Radiobeacons may fail to reach the Hydrographic Department in time for a notice to be promulgated before the event.
>
> 4. A number of Aero Radiobeacons considered to be particularly unsuitable for marine use

[8] The capitalization appears in the book itself.

> have been omitted from this edition. Associated chart action will be effected as opportunity occurs. Meanwhile, mariners are warned that the charted position of an Aero Radiobeacon not listed in this volume may be in error.

In making the foregoing analysis of the Special Master's criticisms of the 1969 edition, Owners are of course not suggesting that the IRISH SPRUCE would have been "unseaworthy" if the 1971 edition had reached the Vessel before the stranding. But Owners *do* suggest that the arrangement of the most recent edition of a publication is not necessarily preferable to that of an earlier edition; there are those, for example, who consider the arrangement of the 14th edition of the *Encyclopedia Britannica* better than that of the 15th. Similarly, some might consider the 1969 edition preferable to that of the 1971 edition, at least insofar as San Andres is concerned, first, because in the 1969 edition, but not in the 1971 edition, all of the essential information about it could be found in one place—the pertinent area chart contained in Volume II itself, and second, because, as the Special Master conceded in his Supplemental Report, "the San Andres beacon is not as clearly listed in the 1971 Admiralty List of Radio Signals as it might have been". (1029a).

In any case, to meet its burden of establishing unseaworthiness as a cause of the loss along with the "immediate", "proximate" cause—error in navigation—Cargo was required to prove that the information contained in the nautical publications on board the IRISH SPRUCE was inadequate for the safe navigation of the vessel. *Savannah Sugar Refining Corp.* v. *Atlantic Towing Co.*, 15 F.2d 648 (5th Cir. 1926); *The Temple Bar*, 137 F.2d 293 (4th Cir. 1943). Contrary to the finding in the Supplemental Report, there was indisputably ample information on board

the IRISH SPRUCE to enable her navigators to use the vessel's RDF had they chosen to do so. If their omission to make use of it was an error at all—and Owners submit that while the navigators are chargeable with errors, this was not one of them—it was an error in the navigation of the vessel, in no way related to any "unseaworthiness". See *Rederiet for M/T Seven Skies* v. *The S/S North Dakota,* 242 F. Supp. 385 (S.D.N.Y. 1962), *aff'd on the decision of the District Court,* 347 F.2d 507 (2d Cir. 1965); *Matter of Bernhard Schulte,* 1974 A.M.C. 2472 (7th Cir. 1973) (not officially reported). The finding, in the Supplemental Report, of "unseaworthiness" based upon the asserted absence of any information on board the IRISH SPRUCE concerning the San Andres Aero Radiobeacon was clearly erroneous and should therefore have been set aside by the District Court.

If the Court should agree that Cargo has failed to sustain its burden of proving that the IRISH SPRUCE was "unseaworthy" in respect of her List of Radio Signals, the question of "due diligence" need never be reached. Likewise, even if the Court should disagree on the "unseaworthiness" issue, but should agree that Cargo has failed to sustain its further burden of proving causation, it would never have to consider "due diligence". A word should, however, be said in answer to the Special Master's comments on that issue.

First of all, the Original Report appears to fault Owners because "there was no regular practice of providing *U.S.* charts, pilots, or radiobeacon lists to the vessel" (1003a)—something they were of course not required to do, as the IRISH SPRUCE carried the British, rather than the

American, compilation of nautical publications. It then charges that the new British publications were:

> . . . only available through a bureaucratic system by which the owners first mailed to the vessel a notice to mariners indicating the publication of new periodicals. The vessel then filled out a form indicating its desire to have the publication which was then mailed back to Ireland. The owners would then obtain the required publication and mail it to the vessel. This system takes several months for vessels in the Western Hemisphere. (1003a-1004a).

It is submitted that there was nothing extraordinary about this procedure. We are not here concerned with a badly outdated chart or other nautical publication containing erroneous or inadequate details concerning navigational aids in the area, but with a fairly recent List of Radio Signals containing perfectly correct and adequate information about the aero radiobeacon in question. There was therefore no great urgency in getting it to the vessel, as is indicated by the fact that the British Admiralty itself delayed some three months (from August to November, 1971) in announcing publication of the new edition.

It is submitted that under the circumstances Owners were not guilty of any failure to exercise due diligence in first sending the announcement to the vessel, and then sending the new edition to the vessel by air mail when Second Officer Healy requisitioned it along with other nautical publications.

POINT II

The Special Master's Conclusion That Cargo Met Its Burden Of Proving That The Equipment Of The Irish Spruce With The 1969 Edition Of The List Of Radiobeacons Instead Of The 1971 Edition Was A Cause Of The Loss Was Clearly Erroneous And Should Have Been Set Aside By The District Court.

If this Court agrees with Owners' submissions, in Point I, that the IRISH SPRUCE was not unseaworthy and that in any case there was no failure to exercise "due diligence," it need not reach Point II, wherein Owners will show that even if the alleged "small defect" found by the Special Master in the List of Radiobeacons on board had amounted to "unseaworthiness"—which Owners categorically deny—Owners would nevertheless be entitled to exoneration, as Cargo utterly failed to sustain the burden of establishing a causal connection between the alleged deficiency and the loss imposed upon it by the unmistakably clear rule of *The Maru, supra.*

The original Report quotes from *May* v. *Hamburg Amerikanische Packetfahrt Akt. (The Isis),* 290 U.S. 333 (1933), and *The West Arrow,* 80 F.2d 853, 856 (2d Cir. 1936), which concerned the carrier's burden of proving due diligence to make a vessel seaworthy as a condition precedent to exoneration from liability for losses due to navigational errors under § 3 of the Harter Act, 46 U.S. Code § 192. The Report then states:

> The passage of the Carriage of Goods by Sea Act in 1936 makes the necessity of delineating causation attributable to unseaworthiness unavoidable.
>
> Decisions often avoid such a difficult interplay by simply finding that the unseaworthy condition was not the cause of the defective navigation. In the

Director General of India Supply Mission v. *S/S Maru, supra,* the Court found that, although there were outdated charts which constituted an unseaworthy condition, the Master had not relied thereon, and, consequently, the stranding was not caused by the unseaworthy condition. In *United States* v. *Soriano,* 366 F.2d 699 (9th Cir. 1966), it was found that the inoperativeness of the fathometer had nothing to do with the pilot's negligent navigation of the vessel, which alone was the proximate cause of the stranding.

Owners, naturally, rely heavily on Judge Frankel's decision in *M.S. Nicolaos S. Embiricos, supra.* That case rests on the factual finding that the error was not in the failure to supply proper navigational information but in the Master's improper use of information available aboard the vessel. Here, however, we have an omission which affected the quality of the navigation. (1000a-1001a).

The Special Master thus suggests that this Court was avoiding the issue of causation when it decided *The Maru* and *The Nicolaos S. Embiricos.* In engaging in a discussion of a "difficult interplay", presumably of various possibilities, and the effect of an "omission" on "the quality of the navigation", the Special Master, possibly because of his own opinions formed while serving as a Coast Guard officer, disregarded uncontradicted evidence and instead resorted to speculation, which included an attempt to predict human behavior under circumstances which did not in fact exist.

The rule of *The Maru* has been stated and restated in a number of other decisions of this Court. In *In Re Marine Sulphur Queen,* 460 F.2d 89 (2d Cir. 1972), *cert denied,*

409 U.S. 982 (1972), the Court held that where there is simply no proof, one way or the other, on the issue of causation, the cargo interests fail to carry their burden of establishing a causal relationship between unseaworthiness and the loss. In *The Nicolaos S. Embiricos, supra,* this Court, in adopting the opinion of the District Court, emphasized that in such cases the cargo interests' burden of proving causation cannot be sustained by resort to speculation. In *Complaint of Grace Line, Inc.,* 517 F.2d 404 (2d Cir. 1975), this Court held that speculative expert testimony will not suffice to establish a causal relationship between the alleged unseaworthiness and the loss, in the face of factual testimony to the contrary.

Nevertheless, in both his Original Report and his Supplemental Report, the Special Master completely ignored the uncontradicted evidence that none of the vessel's officers had examined the Admiralty List of Radio Signals that *was* on board the IRISH SPRUCE, and that it had not even occurred to any of them to try to take radio bearings until midnight, when Second Officer Healy turned on the radio direction finder, but hearing nothing except static, thereafter made no further attempt to obtain a signal. He likewise ignored the complete absence of any evidence whatsoever that any of the officers had *ever* used the radio direction finder for the purposes the Special Master would have had them use it, *i.e.,* for the purpose of taking a "running fix" or to provide a "danger bearing".

What the Special Master did was to substitute speculation for the undisputed factual evidence.

The Special Master based his conclusions upon his findings, (1) that the officers had on other occasions used nautical publications and aids to navigation, and (2) that they recognized the validity of the maxim that it is good practice to utilize all available navigational aids. The

Supplemental Report *assumes* that because the officers had previously utilized various aids to navigation available on the IRISH SPRUCE, which is hardly surprising, and because he agreed they were conscientious, which is surely to their credit, they would have used the San Andres Radiobeacon had the revised edition been on board. But apart from this supplying of an answer to the wrong question, surely the overwhelming and uncontradicted evidence of what those officers *actually did* must supplant mere assumptions of what they *might have done* as a basis for the proof of causation required by *The Maru.*

Even if it be assumed, *arguendo,* that the 1969 edition of the Radio Signals List, like the navigational chart in *The Maru,* was deficient (and it was not), and that its presence on board the vessel therefore constituted "unseaworthiness" (which it did not, as Owners have shown in Point I), there is not one iota of proof in the record that either the Master or any of the three deck officers of the IRISH SPRUCE —and all of them testified—ever referred to the List on board at any of the material times. Hence, to paraphrase this Court's language in *The Maru,* neither the presence of the earlier edition nor the absence of the newer edition could possibly have been a cause of the stranding.

The Special Master found, *not* that the List of Radio Signals or any of the other nautical publications actually on board in fact misled the navigators, but that it should have been foreseeable to Owners that if the 1971 edition was not dispatched to the vessel immediately after announcement of its publication, the navigators *might* be misled.

The Maru and *The Nicolaos S. Embiricos* both illustrate how foreign the concept that foreseeability proves causation is to any case wherein "the burden of proof rules in

COGSA" apply. Certainly it could have been said in *The Maru* that it was foreseeable that the grossly outdated chart on board in that case, seriously misrepresenting topographical features and the location of navigational aids, might mislead the navigator if the navigator were to refer to, and be guided by it. Perhaps it could have been said in *The Nicolaos S. Embiricos*, that it was foreseeable to her Owners that if her Master were to have occasion to use his vessel's radar, he might refrain from using it if he lacked the information that another vessel had obtained good radar "returns" from the Maldive Islands—information which could have been found in a publication more recent than those on board his vessel. But in neither *The Maru* nor *The Nicolaos S. Embiricos* did this Court accept such speculation as meeting the burden of proof imposed upon cargo interests once the carrier proves that the loss was caused by navigational error.

The Special Master cites not a single contract case in which the concept of foreseeability has been applied as a substitute for proof of causation. Instead, he cites two decisions involving the rights of the next of kin of maritime workers against vessel owners: *Zinnel* v. *United States S.B.E.F. Corp.*, 10 F.2d 47 (2d Cir. 1925) and *Kirincich* v. *Standard Dredging Company*, 112 F.2d 163 (3d Cir. 1940), neither of which is in any sense pertinent. Given the quite proper solicitude of the courts for maritime workers entitled to a warranty of seaworthiness, it is not surprising that the law requires them—or their dependents if death ensues—to show only the probability of causation, not the certainty. See *Karakikolas* v. *Navegacion Maritima Panama*, 157 F.Supp. 602 (S.D.N.Y. 1958).

In the present case, there are no such considerations; here, parties to a contract of carriage are asking only that it be enforced in accordance with its terms.

The distinction between causation in tort cases and causation in contract cases, which the Special Master failed to draw, is well illustrated by *In Re Marine Sulphur Queen, supra,* where a vessel was lost at sea, together with her entire crew, and there was no proof one way or the other as to what caused the loss. This Court held the personal representatives of the seamen entitled to recover, but denied recovery to the owners of the vessel's cargo. The distinction turned solely on burden of proof. As tort claimants, the personal representatives could rely on a presumption of causation which the cargo owners, as contract claimants, did not enjoy. This Court stated:

> Although findings as to unseaworthiness and negligence are not, in this circuit, protected by the "unless clearly erroneous" test of F.R.Civ.P. 52(a), Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F.2d 774, 776-778 (2 Cir.), *cert. denied,* 385 U.S. 835, 87 S.Ct. 80, 17 L.Ed. 2d 70 (1966), such findings are entitled to great weight and will ordinarily stand unless the lower court manifests an incorrect conception of the applicable law. Cleary v. United States Lines Co., 411 F.2d 1009 (2 Cir. 1969). We can see no reason to disturb the lower court's findings of unseaworthiness.
>
> The wrongful death claimants therefore sustained their burden of proving unseaworthiness and there remained *only the issue of whether or not one or more of the conditions of unseaworthiness or some other agency caused the disaster.* The court found in explicit terms that "no one knows how the ship was lost." *The resolution of the question of liability will, under the circumstances, be determined by the allocation of the burden of proof on the causation issue,* the existence of a rebuttable presumption

> and whether or not that presumption has been met. (460 F.2d 89, at 97-98).

The cargo claimants, on the other hand, were held not entitled to an inference of causation:

> Here, some of the possible causes of the loss are particularly exempted from owner liability, *e.g.*, fire, explosion, danger or accident of the sea, or neglect in the navigation of the vessel. * * * [*I*]*n a case such as this, where the shipper was unable to prove that his loss was occasioned by some cause for which the carrier was liable, there can be no recovery.* (460 F.2d 89, at 104-105).

See also *Reddick* v. *McAllister Lighterage Line,* 258 F.2d 297 (2d Cir. 1958), *cert. denied* 358 U.S. 908 (1958); *Waterman Steamship Corporation* v. *David,* 353 F.2d 660, 665-666 (5th Cir. 1965), *cert. denied* 384 U.S. 972 (1966); *Ferrigno* v. *Ocean Transport, Ltd.,* 201 F. Supp. 173, 184 (S.D.N.Y. 1961), *rev'd on other grou* 309 F.2d 445 (2d Cir. 1962).

Since the decision below would afford Cargo the benefit of an inference of causation to which it is plainly not entitled under the controlling decisions of this Court it follows that irrespective of whether the proposed findings are subject to the "clearly erroneous" test, or to some other standard, the fact finder has plainly "manifest[ed] an incorrect conception of the applicable law", and his findings and conclusions should not have been approved.

The Special Master's conclusion that if the new edition had been on board the fact that it included the unessential additional information that San Andres Radiobeacon's power was one kilowatt and that it was supposedly in con-

tinuous operation would have caused the navigators to use it credits them with clairvoyance. How could such information possibly prompt anyone to consult the List if he could not obtain the information without first finding it in the List itself?

The uncontested evidence is that it did not occur to Second Officer Healy to take a radio bearing, or to try to obtain a "running fix" on the midwatch of January 26th. Since he did not look at the List on board before switching the RDF on at midnight, the Special Master's conclusion that a different sequence would have been followed had the revised edition been on board is based solely upon his subjective evaluation of Mr. Healy as a conscientious officer. Would his proposed finding have been otherwise if that evaluation had been unfavorable, rather than favorable? In either case such a finding would be purely speculative, and would not constitute the proof required of cargo under COGSA.

Mr. Healy was and is a conscientious navigator, but the fact remains that he did *not* look at the List that *was* on board. To conclude, therefore, that he would have looked at the *revised* edition had it reached the vessel is not a factual finding based on the fact finder's favorable impression of a witness testifying to that fact; it is purely and simply speculation as to what the witness *might* have done, given an assumed set of facts which did *not* exist. The proposed finding would lead to the strange result of penalizing Owners for manning their vessel with "unusually conscientious navigators". If the Second Officer had made an *unfavorable* impression on the Special Master, the latter's reasoning would have required a finding that he would *not* have examined the revised edition, in which case Owners would surely have been entitled to exoneration under the rule of *The Maru*. So penalizing a carrier who

employs conscientious navigators is hardly a proper application of the rules of burden of proof laid down by this Court in that and the other cases cited.

Even if Cargo had somehow been able to prove that the navigators would have looked in the new edition if they had had it on board, and would then have tried to ascertain their position by radio bearings, Cargo would still have been required to prove, as a vital link in the chain of causation, that accurate bearings could have been obtained on the night of the casualty. Particularly in light of the "Caution" in the 1971 edition, quoted at page 22, *supra*, concerning the unreliability of *aero* radiobeacons as aids to *marine* navigation, such proof would have had to take the form of direct factual evidence, and not speculative inferences drawn from testimony concerning experiences remote in time and under conditions widely differing from those prevailing on the night the vessel stranded.

As a first step in proving causation, Cargo had to prove the San Andres Radiobeacon was in fact transmitting during the period Cargo contends the vessel's navigators should have been attempting to obtain bearings on it. The Original Report merely infers that it was transmitting during that period; it states that "The evidence showed that it had been in continuous transmission prior to that time, and that it was in continuous transmission thereafter" (995a). There is in fact no such evidence in the record.

Five witnesses testified as to their experiences in taking, or attempting to take bearings on the San Andres Radiobeacon. Their testimony established that on some unspecified day or days in June or July, 1972 (Exh. Q, 735a), on August 29-30, 1973 (Exh. J. 646a), on September 2-3, 1973 (Exh. I, 573a), on October 5, 1973 (Exh. N, 682a), on October 14-15, 1973 (197a), and on February 1, 1974 (Exh. Q, 740a, 745a),—all dates between five and 25 months

after the stranding—the Radiobeacon was transmitting. The only testimony concerning its operation *before* the stranding was that of one of the same witnesses, who testified that on certain voyages he had made through the area, on unspecified dates, the Radiobeacon was transmitting, *although at night he had not been able to obtain accurate bearings on it.* (Exh. Q, 765a-768a).

A vessel named the EASTERN VENTURE preceded the IRISH SPRUCE on her route by a few hours (Kerr Dep., 502a), but Cargo produced no evidence from her navigators as to whether the Radiobeacon was operating, or as to the accuracy or inaccuracy of the bearings, if any had been obtained. Nor was any evidence produced from any other vessel that may have been transitting the area on or about the date of the stranding. Nor did Cargo offer any testimony of the operators of the Radiobeacon itself. Under these circumstances, no inference should have been drawn that the San Andres Radiobeacon was transmitting any reliable signals on the night of the casualty—or, in fact, that it was transmitting at all. See *McFarland* v. *Gregory,* 425 F.2d 443, 447 (2d Cir. 1970). Indeed, the finding that reliable—or any—signals could have been obtained from San Andres is inconsistent with the Original Report itself, which states:

> Despite the heavy marine service through these waters, *these hazards to navigation are poorly marked and inadequately serviced.* (977a).

If this be so, what is there to justify an inference that a particular aero radiobeacon was operating effectively—if at all—on the night of the stranding, simply because it was found to be operating—sometimes effectively and sometimes not—on occasions remote in time from that night?

Atmospheric conditions vary substantially from night to night, and unless one knows the conditions prevailing on the particular occasion, it is impossible to say whether or not there will be interference with the reception of radio signals.

The only objective evidence concerning the question whether or not any bearings of value could have been obtained on the night of January 26th/27th, 1972 is Mr. Healy's testimony that when he activated the RDF at midnight, the static due to tropical storms in the area was so bad that he could receive no signal—evidence which the Magistrate simply chose to ignore.[9]

Turning to one of the two uses the Special Master found could have been made of the RDF, the finding that the San Andres Radiobeacon would have provided an excellent "danger bearing", presumably after midnight of January 26th/27th, is not supported by any evidence whatever. A bearing had to be obtainable in the critical area after the IRISH SPRUCE had passed the point where it was expected that Roncador Light would be observed. The only evidence of conditions at that time is that static prevented the reception of *any* bearing. The Report suggests that a danger bearing of 205° T. or greater could have been used, and if maintained would have kept the vessel out of danger.

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[9] The Original Report (996a) states that "Even under bad weather conditions, the evidence established that the beacon was usable for 150 miles". Just what evidence the Report refers to is impossible to say. The only specific mention of 150 miles is in the deposition of Captain Gregware (Exh. J, 652a) and in Captain Cushman's testimony (197a, 201a-202a, 233a).

Captain Gregware's comment about the weather was, "It was partly cloudly, *a nice night.*" (Exh. J, 664a).

Captain Cushman testified that he heard the beacon's signal at 150 miles with moderate static, but that there were no storms in the area, and that *he would not put much faith in the bearings* (233a).

(977a). Under the conditions prevailing, it would have been impossible to obtain a precise bearing at the distance the IRISH SPRUCE was from San Andres. The evidence is undisputed—and it comes from one of Cargo's own witnesses —that when squalls interfere, if a bearing is obtainable at all, it can be in error by 10°. (708a). The bearing of San Andres from Serrana Bank to the East of Quita Sueno is 215°. If the bearing was in error by 10° to the East, by maintaining that danger bearing or greater, the vessel might have stranded on Serrana Bank.

We turn, finally, to the other use the Special Master suggested could have been made of RDF bearings on San Andres—the making of a "running fix". The Special Master recognized the obvious fact that "a single line of bearing is not of the same value as two or more intersecting lines giving a 'fix' ". (996a). A single bearing would indicate only the direction of the object, not its distance from the vessel.

While it is possible to make a "running fix" from successive bearings on the same object, *e.g.*, a light, such "fixes" are scarcely ever attempted on RDF signals. The Special Master was certainly understating the case when he conceded that such a "fix" is not "tremendously accurate", and in any case *these* navigators would not have attempted it, whether or not the 1971 edition was on board, as their testimony plainly shows.

POINT III

If This Court Should Disagree With Owners' Submission That The Decision Below Should Be Reversed As Based Upon Clearly Erroneous Conclusions of Unseaworthiness And Causation, The Case Should Be Remanded For Trial Before A District Judge, Because In Reaching His Conclusions The Special Master Improperly Relied Upon Opinions Formed As Commanding Officer Of Loran Stations.

The Federal Magistrates Act, 28 U.S. Code §§ 631-639, provides, in § 636(b)(1), that magistrates may be authorized to serve as special masters in appropriate civil actions. Rule 53(b), F.R. Civ. P., provides that a reference to a special master shall be the exception, and not the rule, and shall in any event be made only upon a showing that some exceptional condition requires it. Rule 706 of the new Federal Rules of Evidence codifies the "inherent power of a trial judge to appoint an expert of his own choosing" (Weinstein, Evidence, 706-4) but the Rule, as did the case law preceding it, expressly preserves the right of cross-examination.

The appointment of magistrates to assist the district courts in respect of pre-trial and procedural matters has received well-deserved approval, particularly in the Southern District of New York. Here, however, we are concerned, not with assistance to the District Court in pre-trial proceedings or procedural matters, but with the appointment of a Magistrate as Special Master to hear the case on the merits and, as the Special Master interpreted the Court's order referring the case to him, to render a decision thereon. If the Special Master's interpretation of the order were correct, it would be clearly invalid under the Magistrates Act. *C.A.B.* v. *Carefree Travel, Inc.*, No. 74-2431 (2d Cir., March 7, 1975), Slip Opinion, 2169, 2178; *TPO, Inc.* v.

McMillen, 460 F.2d 348 (7th Cir. 1972); see also *Wingo* v. *Wedding,* 418 U.S. 461 (1974).

There was no showing under Rule 53, F.R. Civ. P., of any exceptional conditions requiring a reference. Indeed, had such a reference been ordered by the District Court over the parties' objections, the order would have been subject to constitutional objections. *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249 (1957); *United States* v. *Kirkpatrick,* 186 F.2d 393 (3d Cir. 1951); *Dye* v. *Cowan,* 472 F.2d 1206 (6th Cir. 1972). The question, therefore, is whether the otherwise objectionable reference herein was validated by their consent. Owners submit that it was not. Assuming, *arguendo,* that consent, freely given with full knowledge of all pertinent facts, would have eliminated the objection, this was not the case here, where the Special Master did not disclose to counsel the claim to expertise which he subsequently relied upon in reaching his conclusions of "unseaworthiness" and "causation".

If it had come to their knowledge that the Special Master intended to rely upon his own asserted expertise as a substitute for expert testimony on a highly technical subject—testimony which would have had to stand the test of cross-examination—consent would of course have been withheld. The only disclosure of his Loran experience made by the Magistrate before issuance of his Original Report was a casual and then unnoticed remark made halfway through the hearing:

> As I understand the operation of Loran, I regret to say I don't know as much as I should have, despite the fact I commanded a couple of Loran stations at various times, Loran works by measuring the difference in time in microseconds of the receipt of the electronic waves from the two pairs of stations. (369a).

In view of this concession of a limitation on the extent of his knowledge of Loran, the Special Master's mention of his Loran station experience, even if it had been noticed during the hearing, could scarcely have led Owners to believe that he would lean so heavily on his preconceived opinions on so highly technical a subject as the relative merits of Loran and Decca Navigator—the two leading long range navigational systems now in use.

In Footnote 16 to his Original Report the Special Master stated:

> The undersigned was for a couple of years a navigator in the U.S. Coast Guard, for a short period the Commanding Officer of two Loran stations, and also spent two summers as a merchant seaman. (1007a).

It was this experience he was referring to when, despite the disclaimer of "much" knowledge of Loran made during the hearing, he stated in his Report:

> It appears proper in admiralty cases for the finder of fact to use his own knowledge of navigation and seamanship acquired by personal observation and experience. *The Eleanore,* 248 F. 472, 473 (6th Cir. 1918). From this I can say, without hesitation, that the equipping of the vessel with a Decca Navigator useful only in the area of the British Isles rather than a loran receiver, which would have been of value to the vessel during all of its voyages since its last drydocking, denied the vessel the most valuable deep sea electronic navigational aid in wide usage at the time of stranding. (988a-989a).

It is apparent from the Report itself that the Special Master's previous experience as Commanding Officer of the two Loran stations in fact pre-disposed him to a "strong personal belief" (989a) respecting that particular type of electronic navigational aid, with the result that he held Owners to "an unnecessary counsel of perfection", see *U.S. Steel Products Co.* v. *American & Foreign Ins. Co.*, 82 F.2d 752, 754 (2d Cir. 1936), which neither COGSA nor any other law, statutory or decisional, would require.

While stopping just short of holding the IRISH SPRUCE "unseaworthy" because she carried a Decca Navigator rather than Loran, the Report reflects an enthusiasm for the latter type of long-range navigational equipment which, no matter how well-intentioned, has so thoroughly influenced the Special Master's reasoning as to account for his manifest errors in the application of the COGSA rules of burden of proof.

The Report not only considers the absence of Loran equipment an "error" (989a) but indicates that the equipment of the vessel with a Decca Navigator was a "defect" (987a), and describes the equipment as "the wrong type of electronic position finding device". (997a). It concedes (987a) that Loran coverage in the area of the stranding was "marginal", and decides that "the absence of Loran (and the presence of the totally useless Decca Navigator) will not be considered an element of unseaworthiness", but neverthelss concludes, "However, *this situation does stress the need for making maximum use of the remaining electronic navigational aids aboard the vessel.*" (989a).

The Report would thus require a higher standard of care for vessels equipped with a Decca Navigator than for vessels equipped with Loran. What is the basis for

this extraordinary view? Neither in the pleadings, nor on the depositions, nor in any of the pre-trial discovery proceedings, nor in the pre-trial order, nor, indeed, at any time until it was suggested at the hearing by the Special Master himself, did Cargo ever offer the slightest criticism of the equipment of the IRISH SPRUCE with a Decca Navigator instead of Loran. Not a shred of evidence was produced on the relative merits of the two systems. Not a single authority was cited in support of the theory that a vessel should be equipped with Loran —or, for that matter, with long-range navigational aids of any type. The basis for the charge that the absence of Loran was an "error" was none of these; it was the preconceived opinion of the Special Master, drawn from his personal experience as the former Commanding Officer of the two Loran stations.

It is elementary that while a judge (or a special master) may of course take judicial notice of matters of common knowledge, such as those contained in an almanac, he may *not* decide an issue on the basis of personal knowledge of matters outside the record and not of common knowledge, or on information obtained by his personal investigation. *Brown* v. *Piper*, 91 U.S. 37 (1875); *Southern Shipyard Corp.* v. *Tugboat Summitt Inc.*, 294 F. 284 (4th Cir. 1923).

Neither *The Eleanore, supra*, cited by the Special Master in support of his asserted right to draw upon his Loran experience in reaching his conclusions, nor any other authority Owners have been able to find lends any support to what the Special Master did in the case at bar. In *The Eleanore*, the judge announced *at the beginning of a hearing*, "in order that parties and counsel might know about it" (248 F. 472, at 474), that he had inspected the site of a collision and had observed the prevailing currents. The

Court of Appeals held that *in view of this statement* it was too late to object after the decision had been rendered. The Court explained that "it would not be improper, as we think, *in such circumstances* for a judge to use his knowledge of navigation and seamanship, which he had acquired by personal observation and experience, *in considering and weighing evidence and deciding cases of conflicting evidence.*" But in the present case, in relying upon opinions formed as a result of his personal experience, the Special Master was *not* "considering and weighing evidence", or "deciding cases of conflicting evidence"; he was using it as a substitute for proof completely lacking in the record.

In *Lemar Towing Co., Inc.* v. *Fireman's Fund Insurance Company,* 352 Fed. Supp. 652, 660, *aff'd on opinion below* 471 F.2d 609, (5th Cir. 1973), *cert. denied* 414 U.S. 976 (1973) the Court stated:

> Mindful of the rule that the underwriter bears the burden of proving unseaworthiness, *we must determine whether the Trudy B was unseaworthy because of her crew solely on the weight of the evidence and without regard to whatever maritime skills the Court may possess.* * * *

See also *Hanover Fire Insurance Company* v. *Holcombe,* 223 F.2d 844, (5th Cir. 1955), *cert. denied* 350 U.S. 895 (1955).

In *Baker* v. *Simmons Company,* 325 F.2d 580 (1st Cir. 1963), the Court stated, in referring to the authority of a special master:

> The Master's unquestioned right to disregard any evidence which he thinks is of doubtful probative

> value, Aycrigg v. United States, 136 F.Supp. 244 (N.D. Cal. 1954), *does not enable him to substitute evidence of his own without following ordinary judicial procedures.* 325 F.2d 580, at 583-584.

In its Memorandum Decision of March 4, 1975 (1017a-1023a) the District Court said that the disclosure in the Report was made by the Special Master with "characteristic thoroughness and candor", and that it required "a long leap of psychoanalytic reasoning" to establish that such views had led to an overly strict "counsel of perfection" on the issue of *due diligence* (1020a). The District Court's views are erroneous for three reasons: (1) the "candor" came too late; (2) the "counsel of perfection" was *not* applied by the Special Master with respect to the issue of due diligence—an issue on which the burden of proof would concededly have rested with Owners, if Cargo had proved unseaworthiness and causation—but to the issue of seaworthiness *vel non*, on which the burden of proof rested with Cargo,[10] and (3) Owners pursued no process of "psychoanalytic reasoning" in asserting that the Special Master had applied an overly strict counsel of perfection in determining that the vessel was unseaworthy; the Special Master himself stated that the absence of Loran and the presence of the Decca Navigator "stress[ed] the need for making maximum use of the remaining electronic navigational aids aboard the vessel." (989a).

While the Federal Rules of Evidence were not in effect at the time the Report was made, Rule 706(a), permitting the Court to appoint an expert of its own choosing, is a codification of previous case law. *Scott* v. *Spanjer Bros.*

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[10] Since the disclosure was made under the heading "Unseaworthiness" (Report, 987a-989a), it is not clear how the District Court came to confuse that issue with the issue of due diligence.

Inc., 298 F.2d 928 (2d Cir. 1962). But the rule, as did the cases, carefully preserves the right of the parties to cross-examine such an expert concerning his qualifications—a right which is lost when a judge—or a special master—presumes to act as his own expert.

The Report states (987a) that "Cargo claims that the IRISH SPRUCE was unseaworthy in several respects". It is, of course, true that Cargo *claimed* unseaworthiness in two (not "several") respects. But immediately after the quoted statement the Report refers to Cargo's *claims* as "these *defects*". The Report then continues, in the very next sentence, "These *defects* largely arise from the fact that IRISH SPRUCE was equipped with British electronic position finding equipment (a Decca Navigator), and with British Admiralty publications". If the intended reference is to the two British Admiralty publications (the "Pilot" and the Radiobeacon List) Cargo claimed should have been replaced by new editions published by the British Admiralty shortly before the stranding, then the fact that the publications on board were British obviously did not cause "defects". If the reference is to the British electronic position finding equipment on board (the Decca Navigator), then what the Report finds was a "defect" was *not* one that Cargo ever contended was a defect until the Special Master himself introduced the subject of Loran at the hearing.

The Report explains that this equipment, which it characterizes as "the wrong type" (997a) was installed because the vessel was constructed in the British Isles and "overhauled" (drydocked) there. It is a fact that the IRISH SPRUCE was built in the United Kingdom, but there is no evidence as to where she was customarily drydocked, if in fact she was customarily drydocked at any one place.

The Report further continues:

> However, duri g most of its years of service the IRISH SPRUCE was in American waters as, indeed, were most of the vessels of Irish Shipping Limited. (987a).

This statement has no support whatever in the evidence and is in fact untrue. The Charter permitted worldwide trading, within "Institute warranty limits", excluding only certain Communist ports and specified troubled areas. There is no evidence as to where the vessel had traded prior to 1971, or as to where Charterers might have sent her on future voyages under the Charter if she had not stranded.

The validity of the Special Master's opinion concerning Loran is at t.e very least questionable, because (a) the "wide usage" to which he attests (989a) would hardly be true if he intended to refer to commercial shipping throughout the world, and (b) the utility of Loran in this case is not supported by the evidence. Although the Special Master's attention was called to "The Loss of the STEEL VENDOR", an article appearing in the April, 1974 issue of the U.S. Coast Guard's "Proceedings of the Marine Safety Council" (Volume 31, No. 4), it was ignored in the Report. The article is based upon the Coast Guard Marine Board of Investigation's Report on the named casualty, the Commandant's action thereon, a d the recommendations of the National Transportation Safety Board, one of which was that:

> The Coast Guard consider the feasibility of requiring all U.S. ships on ocean voyages to have on board long-range electronic navigation ca pability.

Here, then, is the National Transportation Safety Board, as recently as April, 1974, more than two years

after the loss of the IRISH SPRUCE, going no further than to recommend *consideration* of the *feasibility* of requiring United States vessels to have on board "long-range electronic navigation capability"—something the IRISH SPRUCE *did* have on board, in the form of a Decca Navigator, at the time of the stranding. And yet the Special Master, on the strength of a preconceived opinion based upon personal experience which admittedly left him without much knowledge of the subject, would, by judicial fiat, fault a British-built Irish flag vessel for not having on board, in 1972, long-range electronic navigational equipment of a type different from the British type with which she was in fact equipped.

The Special Master's statement that a Decca Navigator was only useful (989a) in the area of the British Isles is unsupported by any evidence, and is simply not the fact. Bowditch, *American Practical Navigator* (1962) to which the Report refers with respect to Loran, states, at page 346:

> Decca coverage extends over much of western Europe and parts of eastern Canada, the Persian Gulf, and the Bay of Bengal.

Although not mentioned in Bowditch, there are Decca installations in South Africa and Australia, and until a few years ago, there was Decca coverage of the New York area.

It seems fair to pose the question: if a vessel equipped with Loran but not Decca should trade from time to time in areas where there is Decca coverage, but no Loran coverage, is she to be considered deficient because she is not equipped with Decca? The answer to that question, and of its reciprocal, is obviously "no".

In areas where Loran is effective it is undeniably a valuable aid, but where there is no such coverage it is

obviously of no value. Whether or not, from a practical standpoint, it is the *most* valuable of the several long-range position finding systems now in use is the subject of debate among the experts.

The Report (987a) states:

> While Loran coverage in the area of the standing is *marginal,* the evidence established that nighttime fixes could be obtained with reasonably good intersecting angles.

This is an inaccurate and misleading summary of the evidence. The reference is to the testimony of Captain James D. McGinty and Captain Paul A. Gregware, each of whom made a voyage from the Panama Canal to U.S. Gulf ports in the late summer of 1973, more than a year and a half after the stranding. (Exhs. I and J; 561a-639a, 640a-677a). Admission of their testimony was objected to on the ground of remoteness, and on the further ground that Cargo had failed to lay any foundation of similarity of circumstances. Decision on the objection was reserved, but the objection was inferentially overruled in the Report. But if this is the evidence to which the Special Master intended to refer, the witnesses' comments on the usefulness of Loran in the area of the stranding are pertinent. Captain McGinty testified:

> A. It has been my experience in this area that loran lines are extremely unreliable. There is a lot of interference in signals, and generally we don't have too much success with loran in this part of the ocean.
>
> Q. Why is that? A. I really don't know, I think it is because of the atmospheric conditions over this ocean mass, probably something to do with the frequencies. It is a common occurrence on all ships

> that operate with loran in this area. * * * (Exh. I, 584a-585a)

Captain Gregware said:

> But the Loran down here, it isn't very good. . . . (Exh. J, 674a).

It is manifest that the Special Master's personal experience did not assist him in "considering and weighing evidence", but instead led him to make factual findings outside of the record for which there is no evidence whatever in the record, and to use those findings as a basis for setting a higher standard of care than he would have applied in their absence. Indeed, Cargo took the position on the depositions of the three United States Lines' Masters called by Cargo to testify about the Radiobeacon on San Andres that Loran coverage was ineffective in the area. It did not reverse course until the Special Master himself interjected the Loran issue at the hearing. (440a-442a).

Summarizing, the unfortunate result of the procedure followed by the District Court was that a party was deprived of its right to have the case heard and determined by a District Judge, to whom the evidence could have been directly presented, and by whom it could have been evaluated. Since Owners' consent to this procedure was given without disclosure of material information concerning the Special Master's claim of expertise, it should not be deemed a waiver of the constitutional and statutory objections to a trial by a special master. Owners submit that this Court should reverse the decision below for clear error in respect of the holdings of unseaworthiness and causation; but if the Court should disagree, the circumstances surrounding the Special Master's appointment,

and his improper reliance upon his own preconceived preference for Loran would require that the case be remanded for a new trial before a District Judge.

CONCLUSION

For The Foregoing Reasons, The District Court's Decision Confirming The Report Of The Special Master, As Amended By His Supplemental Report, Should Be Reversed, With Costs; Alternatively, The Case Should Be Remanded To The District Court For Trial Before A District Judge.

Respectfully submitted,

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(ADDENDUM)

Applicable Statutes and Rules

1. United States Carriage of Goods by Sea Act, 46 U.S. Code, §§ 1300-15, Section 1304 whereof provides, in part:

> (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.
>
> (2) *Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—*
>
> (a) *Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;* * * *

2. United States Magistrates Act, 28 U.S. Code, §§ 631-39, § 636 whereof provides, in part:

> (b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or,

where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

(1) services as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for post trial brief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

Rule 53, F. R. Civ. P., which provides, in part:

(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

* * *

(e) *Report.*

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Rule 706 of the Federal Rules of Evidence, which provides, in part:

(a) *Appointment.* The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may ap-

point expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness. * * *

Service of ~~three~~ Two (2) copies of the within is admitted this 20 day of OCT 1975.

Knight Kessler Bonhoeffer